Supreme Court, U.S.
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No. 97-872

In the Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS ROBERSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly enforced petitioner's knowing and voluntary waiver, in his plea agreement, of the right to appeal his sentence.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1997. A petition for a writ of certiorari was filed on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of one count of possession of cocaine base with intent to distribute it, in violation

of 21 U.S.C. 841(a)(1). He was sentenced to 188 months' imprisonment, to be followed by five years' supervised release. 10/10/96 Sent. Tr. 32. The court of appeals dismissed his appeal. Pet. App. 1a-2a.

1. In late 1994, law enforcement authorities in Texas received information about a large-scale cocaine trafficking organization headed by petitioner. In June 1995, officers conducted surveillance of an apartment where petitioner and his associates were reportedly converting powdered cocaine into "crack" cocaine. When the officers entered the apartment to execute a search warrant, petitioner grabbed a brown paper sack and fled through a rear window. He was arrested in the woods near the apartment complex. Presentence Investigation Report (PSR) at ¶¶ 4-8, 10-11.

A search of the apartment resulted in the seizure of cocaine base, powdered cocaine, scales, approximately $20,000 in cash, and a loaded .38 Lorcin semi-automatic pistol. PSR at ¶ 12. The following day, officers searched the woods into which petitioner had fled and located a brown paper sack in which were a large number of baggies containing crack cocaine. *Id.* at ¶ 15. A search of the car of one of petitioner's associates resulted in another large seizure of crack cocaine, *id.* at ¶ 16, and officers additionally seized a loaded 9mm Baretta pistol from underneath the driver's seat of another co-conspirator's car. *Id.* at ¶ 13.

By superseding indictment, petitioner was charged with two counts of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to distribute the same, in violation of 21 U.S.C. 846. He pleaded guilty to one count of possession with intent to distribute.

In exchange, the government agreed to dismiss the remaining counts after sentencing, and also agreed not to institute any further criminal charges relating to its investigation of petitioner's conduct. Pet. App. 3a.

In the plea agreement, petitioner expressly waived his right to appeal his sentence, either on direct appeal or in a post-conviction proceeding:

> [Petitioner] is aware that his sentence will be imposed in conformity with the *Federal Sentencing Guidelines and Policy Statements*, may be up to the maximum allowed by statute for his offense, and is not subject to parole. By entering into this agreement, [petitioner] voluntarily and knowingly waives his right to contest his sentence in any post-conviction proceeding, including but not limited to any appeal right conferred by 18 U.S.C. § 3742 * * *, provided, however, that this waiver does not extend to his right to appeal any upward departure pursuant to U.S.S.G. § 5K2.0 from the Guideline range found by the district court * * *.

Pet. App. 5a.[1]

Petitioner's waiver of his appellate rights was the subject of several specific exchanges with the district court at the plea hearing:

> THE COURT: * * * [A]s part of your plea agreement, if it's accepted by the court, you're

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[1] Petitioner also reserved the right to appeal a denial of a motion by the United States for a downward departure, and to challenge the sentence on grounds of ineffective assistance of counsel or prosecutorial misconduct. Pet. App. 5a. The petition raises no issue as to those provisions of the agreement.

providing that you will waive or give up some of the limited rights to appeal a sentence that's imposed by this court in your case. Each of you understand that?[2]

MR. ROBERSON: Yes, Your Honor.

3/27/96 Plea Tr. 19.

THE COURT: And have each of you had an opportunity to talk with your lawyer prior to being here today about that—about whether or not you should or should not give up some of those rights to appeal?

MR. ROBERSON: Yes, Your Honor.

* * *

THE COURT: And each of you understands what you're doing?

MR. ROBERSON: Yes, Your Honor.

* * *

THE COURT: And that's what you want to do, is that correct?

MR. ROBERSON: Yes, Your Honor.

Id. at 20.

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[2] Four of petitioner's co-conspirators also pleaded guilty at the same plea hearing.

> THE COURT: * * * Section 3742(a)(1), sets out your appeal rights. * * * And as we have talked about several times, you have in your plea agreement agreed with the government, if that agreement is accepted, to waive or give up some of those rights to appeal.

Id. at 43.

The plea agreement, containing the waiver of appellate rights provision, was read aloud at the hearing, 3/27/96 Plea Tr. 13, and petitioner confirmed that he understood it, *id.* at 14. The waiver was also specifically noted in his presentence report. PSR at ¶ 3. The district court accepted petitioner's plea as knowing and voluntary. 3/27/96 Plea Tr. 47.

2. Petitioner's presentence report assigned him a base offense level of 36, based on a drug quantity of 1,400.52 net grams of cocaine base and 127.43 net grams of powdered cocaine. PSR at ¶ 25. Petitioner did not contest the base offense level. Add. to PSR at 1A. The PSR recommended a two-level adjustment for the possession of a dangerous weapon by one of petitioner's co-defendants under Guidelines § 2D1.1(b)(1) and a four-level adjustment under Guidelines § 3B1.1 because petitioner was the organizer and leader of criminal activity involving five or more participants. PSR at ¶¶ 26-28. It subtracted three levels for acceptance of responsibility, pursuant to Guidelines § 3E1.1. *Id.* at ¶ 22-23. The PSR thus calculated petitioner's adjusted offense level to be 39, resulting in a Guidelines range of 262-327 months' imprisonment. *Id.* at ¶ 58. It found no factors warranting either an upward or downward departure. *Id.* at ¶ 71.

At sentencing, petitioner objected to the adjustments for his co-defendant's firearm possession and his role in the offense. The government argued on behalf of the adjustments and also moved under Guidelines § 5K1.1 for a downward departure of three levels because of petitioner's substantial assistance. The court accepted the adjustments, granted the downward departure, and set petitioner's adjusted offense level at 36, with a resultant range of 188-235 months' imprisonment. 10/10/96 Sent. Tr. 31. The court sentenced petitioner to 188 months' imprisonment. *Id.* at 32.

3. Petitioner appealed his sentence. The government moved to dismiss the appeal on the basis of petitioner's waiver of appellate rights. The government argued that the waiver was knowing and voluntary, and that the sentence conformed to the terms of the plea agreement. Gov't Motion to Dismiss 3. Petitioner, in response, argued that the adjustments under Guidelines §§ 2D1.1(b)(1) and 3B1.1 "should be considered to be upward departures" because "of the effect they had in substantially increasing the sentence." Response to Motion to Dismiss 2. Without opinion, the court of appeals granted the government's motion and dismissed the appeal. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 3) that the district court's adjustments to his basic offense level under the Guidelines—for a co-defendant's possession of a dangerous weapon, and for being an organizer or leader of a criminal enterprise—amounted to an upward departure, which he retained the right to challenge on appeal. That argument is without merit.

An "adjustment" under the Guidelines is not an "upward departure." See Guidelines § 1B1.1 (application instructions, distinguishing between adjustments and departures). An adjustment to a defendant's base offense level is used to account for specific characteristics of the offense, the offender, or the victim. Along with the criminal history category, the adjusted offense level determines a defendant's applicable Guidelines range. By contrast, a departure under Guidelines § 5K2.0 is a deviation from the applicable Guidelines range, granted in cases that fall outside the "heartland" of those contemplated by the Guidelines. See *Koon* v. *United States*, 116 S. Ct. 2035, 2042, 2044 (1996); 18 U.S.C. 3553(b).

In this case, the PSR subtracted three levels from petitioner's base offense level for his acceptance of responsibility (Guidelines § 3E1.1), and added six levels because of a co-defendant's possession of a firearm (§ 2D1.1(b)(1)) and because of petitioner's leadership role in criminal activity involving five or more participants (§ 3B1.1). Those steps were adjustments to produce a Guidelines range, not departures from it. And once the court had arrived at an adjusted offense level of 39, resulting in a range of 262-327 months' imprisonment, the court did not depart upwards. To the contrary, it granted petitioner a *downward* departure based on his substantial assistance to the government pursuant to Guidelines § 5K1.1. The court then sentenced petitioner to 188 months' imprisonment, the lowest sentence within the revised 188-235 month range.

In his plea agreement, petitioner reserved the right to appeal "any upward departure pursuant to U.S.S.G. § 5K2.0 from the Guideline range found by the district court." Pet. App. 5a. Because the district court did

not depart upward from the range it determined to be applicable, petitioner's sentence fell squarely within the terms of the waiver provision in his agreement. His appeal was therefore properly dismissed. "In no circumstances . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." *United States* v. *Yemitan*, 70 F.3d 746, 747 (2d Cir. 1995); see also *United States* v. *Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) ("a defendant who pleads guilty, and expressly waives the statutory right to raise objections to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement").

Properly understood, petitioner's challenge to his sentence is that the district court misapplied the Guidelines in determining the applicable range (although he fails to specify exactly what, in his view, the district court did wrong). As the courts of appeals have consistently recognized, however, an appeal waiver precludes review of an alleged misapplication of the Guidelines. See *United States* v. *Price*, 95 F.3d 364, 369 (5th Cir. 1996); *Yemitan*, 70 F.3d at 748; *United States* v. *Schmidt*, 47 F.3d 188, 192 (7th Cir. 1995); *United States* v. *Ashe*, 47 F.3d 770, 776 (6th Cir.), cert. denied, 516 U.S. 859 (1995); *United States* v. *Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States* v. *Rutan*, 956 F.2d 827, 828 (8th Cir. 1992); *United States* v. *Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). As the Seventh Circuit noted in explaining the dismissal of an appeal similar to petitioner's:

> Defendants who appeal from sentences following plea agreements always point to unanticipated and unwelcome developments. If they had anticipated (which is to say, consented to) these developments, they would not be grounds of complaint. * * * To say that a waiver of appeal is effective if and only if the defendant lacks grounds for appeal is to say that waivers will not be honored.

United States v. *Wenger*, 58 F.3d 280, 282, cert. denied, 516 U.S. 936 (1995).

2. Contrary to petitioner's contention (Pet. 3-5), *United States* v. *Rosa*, 123 F.3d 94 (2d Cir. 1997), is fully consistent with the court of appeals' summary disposition of this case. *Rosa* involved a plea agreement containing a specific estimate of the defendant's likely Guidelines range. The sentencing court, however, calculated the applicable range quite differently, and imposed a sentence harsher than that contemplated by the agreement. 123 F.3d at 96-97. Even so, the Second Circuit enforced the defendant's waiver of appellate rights. That decision accords with the judgment below. Indeed, the court noted that "plea agreements can have extremely valuable benefits to both sides," and that "the waiver provision is a very important part of the agreement." *Id.* at 97.

Petitioner nonetheless cites dicta in *Rosa* expressing concern about the waiver-of-appellate-rights provision presented there. Pet. 3-5. That concern, however, focused on the potential for unfairness where a plea agreement anticipates a certain sentence that is significantly more lenient than the sentence ultimately imposed by the district court. 123 F.3d at 100. No such potential for unfairness existed here, be-

cause the plea agreement did not anticipate any particular Guidelines sentence; to the contrary, it provided that petitioner's term of imprisonment "may be up to the maximum allowed by statute for his offense." Pet. App. 5a.[3]

3. Petitioner also argues (Pet. 4-5) that his waiver of appellate rights was, by definition, unknowing and involuntary because his actual sentence was unknown to him at the time that he executed the waiver. The courts of appeals have consistently rejected such claims, however, reasoning that, although defendants may not know the exact contours of their prospective sentences, they do know that they have a right to appeal the sentence and that they are relinquishing the right. Such knowledge renders the waiver knowing and intelligent. See *Rutan*, 956 F.2d at 830; *United States* v. *Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); see also *United States* v. *Baty*, 980 F.2d 977, 979 (5th Cir. 1992) (when defendant waives right to appeal, she gives up right to "correct a district court's unknown and unannounced sentence"), cert. denied, 508 U.S. 956 (1993); *Wiggins*, 905 F.2d at 53. As the Eighth Circuit has noted, petitioner's argument—that one

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[3] Despite petitioner's suggestion to the contrary (Pet. 3), the Fifth Circuit's dismissal of his appeal is also consistent with that court's own earlier decision in *United States* v. *Kelly*, 974 F.2d 22 (1992). In *Kelly*, the court refused to enforce a waiver of appellate rights because the defendant had been sentenced to a term of supervised release exceeding the statutory maximum. *Id.* at 23-24. This case, however, does not present that issue. Petitioner's 188-month sentence was at the bottom end of the applicable Guidelines range (which itself was the result of a downward departure), and was well below the statutory maximum of life imprisonment. See 21 U.S.C. 841(b)(1)(A).

cannot knowingly and voluntarily waive an unknown right—could be said of waivers generally: "[a]n accused does not know that the government will be able to prove its case, how witnesses will testify, or that he will be able to competently represent himself, yet he may freely waive his rights to jury trial, to confront witnesses, and to counsel." *Rutan*, 956 F.2d at 830 n.2.

Moreover, petitioner's waiver of appellate rights was entirely knowing and voluntary. At his plea hearing, petitioner was told that his crime carried a maximum possible penalty of life imprisonment. 3/27/96 Plea Tr. 37-38. He was told that he would be sentenced at a later date, after the court had reviewed a presentence investigative report, *id.* at 33, and under the Sentencing Guidelines, *id.* at 41-42. Petitioner confirmed that he understood the sentencing scheme, *id.* at 43, and attested that no prediction or promise had been made to him regarding his prospective sentence, *id.* at 46. He repeatedly confirmed his waiver of appellate rights. *Id.* at 19-20. Petitioner—who had graduated from high school in the top 10% of his class, and who had attended the University of Texas, PSR at ¶ 50—understood the rights that he was waiving and the sentencing risks that he was assuming.

Finally, petitioner argues that his waiver of appellate rights should be invalidated as contrary to public policy. That argument is without merit. In plea bargaining, a defendant often agrees to waive important constitutional and statutory rights, see *United States* v. *Mezzanatto*, 513 U.S. 196, 200-203 (1995); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and this Court has recognized that plea bargaining is a valid—indeed vital—component of the criminal

justice system. See *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Consistent with those principles, the courts of appeals have consistently enforced voluntary and knowing waivers of the right to appeal a sentence.[4] In so doing, they have reaffirmed that public policy concerns favor negotiated waivers in plea agreements:

> [I]f the prosecutor is interested in 'buying' the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying.

Mezzanatto, 513 U.S. at 208 (permitting defendant to waive protection of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) as part of plea agreement); see also *United States* v. *Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), cert. denied, 117 S. Ct. 1282 (1997); *United States* v. *Wenger*, 58 F.3d at 282; *Navarro-Botello*, 912 F.2d at 321-322 & n.3; *Wiggins*, 905 F.2d at 54.

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[4] See, *e.g.*, *United States* v. *Buchanan*, 131 F.3d 1005, 1008-1009 (11th Cir. 1997); *United States* v. *Woolley*, 123 F.3d 627, 631 (7th Cir. 1997); *Ashe*, 47 F.3d at 776; *United States* v. *DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *United States* v. *Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir.), cert. denied, 509 U.S. 931 (1993); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *Marin*, 961 F.2d at 496; *Rutan*, 956 F.2d at 829-830.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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